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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHASER SHIPPING CORPORATION and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION),

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF AMICUS CURIAE OF THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CONSENT OF PARTIES

Amicus Curiae has filed this brief with the consent of Appellants and Appellees. Letters of consent have been filed with the Clerk of the Court.

Interest of Amicus

Amicus is a public interest law firm which has, for the past twenty years, sought to advance, through litigation and education, the twin causes of constitutional and international law.

To this end, it has, inter alia, represented members of Congress and religious and civic groups in cases involving separation of powers questions concerning foreign affairs, as well as the duty of the executive and legislative branches to observe, and of the courts to enforce, international law in the conduct of foreign affairs.

Several of these cases have been cited in the pleadings and decisions below, i.e., Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Greenham Women Against Cruise Missiles v. Reagan, 591 F.Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir.

1985); and Sanchez-Espinosa v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985).

Amicus has a constituency of thousands of lawyers, law professors, individuals and organizations throughout the country, who look to it to conduct litigation in matters "touching foreign affairs," to consult with it in litigation which they may bring, and to provide continuing guidance in this area of ever increasing importance in our national life.

Amicus fully agrees with petitioners' claim that "the lower courts desperately need guidance as to when it is proper to dismiss an otherwise justiciable claim on 'political question' grounds."

For these reasons, Amicus submits the attached brief urging that this

Court review the decision of the Court of Appeals for the Second Circuit.

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REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT

The decisions below are a classic example of the tendency of some, but by no means all, judges to avoid the duty laid upon them by Chief Justice Marshall "to say what the law is," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, (1803), for reasons having nothing to do with the law itself. Amicus will argue that, where a genuine legal question is duly presented to a court of competent jurisdiction by a party having standing, it must entertain the question presented, whether or not the underlying facts involve a policy decision by the executive. Thus, the validity of a political question dismissal is inextricable from the presence vel non of a genuine issue of law.

The second part of the argument will show that a genuine issue of law is present in this particular case.

ARGUMENT

I. THIS COURT MUST DECIDE WHETHER THE POLITICAL QUESTION DOCTRINE WARRANTS DISMISSAL WHERE THE ACT IMPUGNED, ALBEIT THE RESULT OF EXECUTIVE POLICY, IS ALLEGED TO BE CLEARLY ILLEGAL

The political question doctrine, under one name or another, has traveled a rocky road from the early days of this Republic to the present. That there should be such a doctrine is a natural, indeed a necessary, concomitant of our tripartite system of government. For whenever the courts are faced with the task of ascribing unlawful conduct to one of the other two branches, their first instinct is to ask themselves "Dare we? Should we? Ought we? Must we?"

Sometimes, the answer is a resounding affirmative, even though aimed at the President himself: Thus, Chief Justice Marshall thought it inconceivable that the law should be "incapable of securing obedience to its mandate ... on account of the person against whom the complaint is made." Marbury v. Madison,5 U.S. 1 (Cranch) at 164. And Justice Jackson, in the steel seizure case, warned that "no penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646, (1952). At other times, as here, the courts make short shrift of claims against the executive.

Rarely, however, in contemporary

jurisprudence, do they do so by a mere legerdemain of nomenclature, i.e., by simply calling a legal question a political question. The rationale for the Court of Appeals decision of which review is sought is that "the decision to take covert rather than overt action was itself a policy decision and as such may not be reviewed in the lawsuit appellants have brought." (emphasis supplied) See, Petition for Writ of Certiorari at p.5a. More frequently, these days, courts will pass up the political question per se theory - indeed, will go out of their way to disavow it - in favor of "unmanageable standards" or one of the other criteria set out in Baker v. Carr, 369 U.S. 186,217 (1962). See, e.g., Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) and

Judge Edelstein's opinion in Greenham Women Against Cruise Missiles v. Reagan, 591 F.Supp. 1332 (S.D.N.Y. 1984), aff'd,755 F.2d 34 (2d. Cir. 1985). In other recent cases, Judges have shown a marked preference for deciding on other than political question grounds. Thus, Judge Bork chose to write an opinion running to twenty-five printed pages to reach the same result as Judge Robb in the latter's brief political question decision, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774,798 (D.C. Cir. 1984), cert. denied, 470 U.S.1003 (1985), (Bork,J.,concurring).[1]

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[1] "It is probably better not to invoke the political question doctrine in this case. That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court, see, Goldwater v. Carter, 444 U.S. 996 (1979), and among scholars, see, e.g., Henkin, Is There A 'Political Question' Doctrine?, 85 Yale

Similarly, Judge Scalia, as he then was, stated, at the outset of his opinion for the District of Columbia Circuit in Sanchez:

> Without necessarily disapproving the District Court's conclusion that all aspects of the present case present a nonjusticiable political question, we choose not to resort to that doctrine for most of the claims. Since we find other bases for dismissing the suit ... we prefer to rest our affirmance ... in most respects on other grounds. Sanchez-Espinosa v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985)

This court has an opportunity, in this case, to shed some much needed light on what Judge Bork has called the "murky and unsettled" political question doctrine, and to do so in a

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L.J. 597, 622-23 (1976)," Tel-Oren, 726 F.2d. at 803, n. 8 (Bork, J., concurring).

manner which will make it clear that, whatever the doctrine holds, it does not relieve the lower courts of the duty to decide questions of law, even where the plaintiff is a foreign company and the matter touches foreign affairs.

II. FOR PURPOSES OF THE MOTION TO DISMISS, THE COURTS BELOW HAD TO ACCEPT PLAINTIFF'S ALLEGATION THAT DEFENDANTS' ACTIONS WERE CLEARLY ILLEGAL

1. The Failure of the United States to Provide Adequate Warning of the Mining Constituted Gross Negligence Under Domestic Tort Law.

Even accepting, arguendo, that, for military reasons, the mining itself had to be carried out covertly, the failure to provide adequate notice to international shipping as soon as the operation was completed constitutes gross and actionable negligence under ordinary principles of tort law. It is

analogous to failing to warn road traffic of an excavation in a street, or the absence of a guard railing on a bridge or the approach of a train at a grade crossing.[2] If this case arose in a domestic context, it would be difficult to conceive of a court holding that the negligence involved in the three hypothetical examples cited above was non-justiciable because it was the result of a policy decision.

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[2]. 28 U.S.C. Sec. 2674 provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances ..." Under this section, the United States has been held liable for injuries resulting from failure to give warning of a newly waxed floor in a post office, Moenck v. U.S, 264 F. Supp. 615 (D.C. Iowa 1966) and of the fact that a box marked "M-80 firecrackers" did not contain ordinary firecrackers, but Army explosive devices, Williams v. U.S, 352 F. 2d 477 (5th Cir. 1965).

2. The Failure to Provide Adequate Warning of the Mining Was In Clear Violation of International Law.

The mining operation at issue in this case prompted Senator Kennedy to declare "I challenge any member of this body to point to any provision of international law that, under any interpretation, permits this kind of unannounced death and destruction to be visited upon innocent civilians." 130 Cong. Rec. S4140 (daily ed. April 9, 1984), cited in Note, The Briar Patch of Reality; A Legal Analysis of the Mining of Nicaragua's Harbors, 18 N.Y.U.J. of Int'L. & Pol. 169, 220 (1985),(hereinafter, "N.Y.U. Note") Indeed, Senator Kennedy could have invoked the authority of a classic of modern international law, the Corfu Channel Case, 1949 I.C.J. Reports 4.

There, the International Court of Justice held Albania liable to the United Kingdom for damage to two British warships caused by mines of which Albania had knowledge of but of which it had failed to give either general or specific notice. The decision was based on "elementary considerations of humanity" and on the principle of freedom of the seas.This ruling was reaffirmed by the I.C.J. in its judgement in the Nicaragua case, where it held, by fourteen votes to one, "that the United States of America, by failing to make known the existence and location of the mines laid by it, ... has acted in breach of its obligations under customary international law." Judge Schwebel, the American judge, voted with the majority. Military and Paramilitary Activities in and against Nicaragua,

1986 I.C.J. 14, par. 292(8).

It is ironic that, barely three and a half years after the Nicaraguan mining operation, the United States is on the brink of war with Iran over what it has properly characterized as Iran's violation of international law in mining the waters of the Persian Gulf.

3. The Mining Operation Itself - Apart From the Failure to Warn - Was In Violation of International Law.

In its Nicaragua decision, the International Court of Justice held "that, by laying mines in the international or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to

interrupt peaceful maritime commerce." 1986 I.C.J. 14 (1986), par. 292 (6). For procedural reasons, the I.C.J. decision was limited to violations of customary international law. The mining operation, however, was also clearly in violation of a number of treaties, including Art. 2(4) of the United Nations Charter, the Charter of the Organization of American States, 2 U.S.T. 2394, the Convention on Rights and Duties of States, 49 Stat. 3097, the U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation, 9 U.S.T. 449 and several others discussed at N.Y.U. Note, pp. 199 ff.

4. Neither the President nor the Courts May Turn a Cold Shoulder to International Law.

The decisions below echo the holding of the Fifth Circuit in Occidental of Umm v. A Certain Cargo that "In their external relations, sovereigns are bound by no law." 577 F.2d 1196, 1204 (5th Cir. 1978). This is not only grievously bad law; if it became the general rule, it would make the United States the most lawless player in the international arena, since no other nation professes to adhere to such a rule (practice, of course, is another matter).

This case affords this court an opportunity to restate the correct rule, as it was stated, for instance, nearly a century ago, in Hilton v. Guyot, 159 U.S. 113, 163 (1895), ("International law, in its widest and

most comprehensive sense ... is part of our law, and must be ascertained by the courts of justice, as often as questions are presented in litigation between man and man, duly submitted to their determination") or, quite recently, by Judge Bork in Finzer v. Barru, 798 F.2d 1450, 1458 (D.C. Cir. 1986) ("We think it clear beyond quibble that since the founding of our nation adherence to the law of nations ... has been regarded as a fundamental and compelling national interest").

To mine the harbors of a country with which the United States is not at war - whether with or without notice to international shipping - is to act as if there were no international law. To say, as the Court of Appeals for the Second Circuit did in the decision below, that this case is non-justici able because the challenged action was

done as a result of a policy decision is to lend credence to the noxious myth that "in their external relations, sovereigns are bound by no law." Everything governments do, except in a purely ministerial capacity, is based on a policy decision. Does it follow that courts are free to pass, rather than pass judgement, on everything done by one of the other two branches which results from "a policy decision"? And if it does, do we still have a government of law, rather than a government of men and women?

CONCLUSION

For the reasons stated above the petition for certiorari should be granted and the judgement of the Second Circuit reversed.

Respectfully submitted,

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